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DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

FILE: B-200722

DATE: October 23, 1981

MATTER OF: Memorex Corporation

DIGEST:

1. Additional materials submitted in support of a timely protest will be considered as part of the protest. The additional materials only provide the rationale for the protest basis clearly stated in the initial protest.
2. A potential competitor for equipment which has been the subject of a contract modification is an "interested party" to challenge the modification as a change beyond the scope of the contract requiring a new competition.
3. Although protests against contract modifications usually are matters of contract administration which we will not review, we will consider protests which contend that a modification went beyond the scope of the contract and should have been the subject of a new procurement.
4. A modification which converts a contract for the acquisition of disk drives from a purchase, with virtually no post-acquisition Government right to assure equipment performance, to a 5-year lease-to-ownership plan, with expansive rights in the Government to enforce newly added performance requirements over the full term of the lease, so substantially alters the rights of the parties as to be beyond the scope of the original contract and results in a contract substantially different from that for which the competition was held. Therefore, a new competition should be conducted.

Contract

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Memorex Corporation (Memorex) protests a modification issued by the Social Security Administration (SSA), Department of Health and Human Services, under a contract option for the acquisition of disk drives, a type of information storage device used with computers. The modification substituted a newer type disk drive and changed the terms of the contract. Memorex contends that SSA should have procured the newer model disk drives competitively rather than by modifying the option. We agree with Memorex.

Background

On January 18, 1978, SSA awarded a contract to Storage Technology Corporation (STC) for the purchase of STC 8800 disk drives to provide 30.4 billion characters of disk storage capacity. On October 28, 1978, SSA exercised an option in the contract to acquire additional STC 8800 disk drives to provide a further 30.4 billion characters of storage. SSA deferred delivery of the option quantity as the result of delays in the availability of SSA's new computer center. After SSA exercised the option, but prior to delivery of the option quantity, SSA experienced problems with the already installed initial quantity of STC 8800 drives and eventually decided it could not accept the option quantity. SSA also determined that it could not establish STC responsibility or liability under the purchase contract for the problems with the model 8800 drives. While SSA was debating whether to terminate the option and expect a claim from STC, or to negotiate a settlement, SSA declined to accept delivery under the option on the last extended delivery date. STC asserted that SSA's failure to take delivery was a breach of the contract. On September 23, 1980, SSA and STC agreed to modification 10 to STC's contract.

Modification 10 provides for the substitution of STC 8650 disk drives for the older model 8800 equipment and converts the option from an outright purchase to a "lease-to-ownership" plan which contemplates Government ownership of the disk drives at the end of a 5-year lease period. The cost of the 5-year lease of

the 8650's is more than \$200,000 greater in absolute terms than the purchase option cost of 8800's. (SSA asserts that the cost is lower when compared on a present value basis--purchase price of the 8800's versus the amount of cash, adjusted for interest, required to pay the lease costs for the newer 8650's over the 5-year period.) Approximately nine of modification 10's 46 pages establish stringent performance requirements for the 8650's over the 5-year lease and specify SSA's remedies for unsatisfactory performance.

Memorex contends (1) that the option was improper; (2) that the exercise of the option was improper; and (3) that modification 10 so changed the nature of the contract that it should have been the subject of a competitive procurement. SSA contends (1) that Memorex is not an interested party under our Bid Protest Procedures, 4 C.F.R. part 21 (1981); (2) that Memorex's various protests are untimely under our Procedures; (3) that the modification was a matter of contract administration not for consideration by our Office; and (4) that the modification was proper, in any event. STC has offered additional reasons as to why Memorex's protest is untimely. We will confine our discussion to those issues which we consider dispositive of the protest.

Timeliness of Memorex's Protest

Memorex filed an initial short protest with our Office on October 7, 1980, contesting, in part, SSA's "failure to obtain competition" under modification 10. On October 17, 1980, Memorex filed a substantial expansion of its protest, charging in part that the substitution of equipment, the change from straight purchase to lease-to-ownership, and the increase in price, so substantially changed the nature of the option that competition was required. SSA contends that this aspect of Memorex's protest cannot be deduced from Memorex's October 7 protest and is therefore untimely because it was not raised until October 17, more than 10 working days after Memorex received a copy of modification 10 on September 26. STC adds that we should not consider Memorex's letter of October 17 because Memorex did not submit these "details" of its protest within the 5 working days contemplated under our Procedures.

Our Bid Protest Procedures, 4 C.F.R. part 21 (1981), generally require that initial protests to our Office contain a concise statement of the grounds for the protest, supported to the extent feasible, and also provide that any additional details required by our Office must be furnished within 5 working days of the protester's receipt of our request for the statement. 4 C.F.R. §§ 21.1(c), 21.2(d). With certain exceptions not relevant here, protests must be filed within 10 working days of the date on which the protester knew or should have known of the basis for its protest. 4 C.F.R. § 21.2(b)(2). Although each new basis for protest must independently satisfy our timeliness criteria, we will generally consider later-filed materials and/or arguments which merely provide further support for an already timely protest. Kappa Systems, Inc., 56 Comp. Gen. 675 (1977), 77-1 CPD 412.

We find this protest to be timely. Memorex's timely initial protest letter of October 7 specifically objects to SSA's failure to conduct a competition for the disks acquired under the modified option. Despite STC's suggestion to the contrary, we find Memorex's October 17 submission to be only an explanation of the rationale for Memorex's fundamental objection which, we note, the protester provided voluntarily and not at our request. Consequently, this material will be considered.

Interested Party

SSA argues that Memorex is not an "interested party" as required under our Procedures (4 C.F.R. § 21.1(a) (1981)) in order to have its protest considered by our Office because Memorex did not compete in the original procurement.

The protest is that changes to the contract were so substantial that the contract should be terminated and a new competition conducted for the modified requirements. As a potential offeror on a new procurement, Memorex has a direct and established interest in the opportunity to compete for the award. Consequently, Memorex is an interested party. Webcraft Packaging, Division of Beatrice Foods Co., B-194087, August 14, 1979, 79-2 CPD 120.

Contract Administration

We do not consider protests against contract modifications unless it is alleged that the modification went beyond the scope of the contract and should have been the subject of a new procurement. Webcraft Packaging, Division of Beatrice Foods Co., supra; Brandon Applied Systems, Inc., 57 Comp. Gen. 140 (1977), 77-2 CPD 486. This contention is the substance of Memorex's protest. Therefore, the protest is appropriate for our consideration.

Change v. New Procurement

We have consistently held that preservation of the integrity of the competitive procurement system requires that contracting parties not make changes to contracts which have the effect of circumventing the competitive procurement statutes. Lawson Division of Diebold, Incorporated, B-196029.2, June 30, 1980, 80-1 CPD 447; American Air Filter, 57 Comp. Gen. 285 (1978), 78-1 CPD 136. This principle is violated when a modification so substantially changes the purpose or nature of a contract that the contract for which the competition was held and the contract which is to be performed are essentially different. Webcraft Packaging, Division of Beatrice Foods Co., supra. We find this to be the case here.

Modification 10's conversion of the option from a purchase to a 5-year lease-to-ownership plan with continuing performance requirements has shifted the burden and risk of nonperformance from the Government to the contractor. STC's only continuing responsibility in connection with the original option was to provide maintenance services and SSA's only remedy for an inoperable disk was to obtain credits against the maintenance agreement. Under modification 10, however, STC has a continuing obligation to assure continuous satisfactory performance of the disks measured by objective standards; if a piece of equipment fails and cannot be repaired, STC must replace it. If a piece of equipment is unsatisfactory, even though it is repaired, SSA may deduct a portion of the rental charge. If deficiencies warrant, SSA may terminate

the contract for default and hold STC liable for the excess costs of reprocurement. In effect, SSA now has acquired a right to continued satisfactory performance which it did not possess under the original option. STC has assumed correspondingly enlarged contractual obligations. We conclude that a change of this magnitude in the fundamental relationship of the contracting parties goes beyond the scope of the original contract and has resulted in a contract which is substantially different from that originally competed.

Memorex's protest is sustained.

SSA should initiate a competitive procurement for the disk drives. Because SSA has expressed a particular need for uninterrupted system availability, we will not object if in conducting the competitive procurement SSA elects to provide for the phased introduction of the replacement equipment. If STC is the successful offeror at a price lower than that under which STC is presently performing, STC's contract should be modified to reflect the lower price. If STC is unsuccessful, the lease should be terminated for the convenience of the Government in accordance with the "no-cost" termination provisions in the contract option. We recognize that implementation of this decision may result in the revival of STC's breach claim. However, that matter is for consideration under the Disputes Clause of the contract.


For the Comptroller General
of the United States